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91-684

SUPREME COURT, U.S.
FILED
OCT 22 1991
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STOUDER MEMORIAL HOSPITAL, Petitioner,

v.

ANASTASIA S. CHRISTOPHER

PETITION FOR A WRIT OF CERTIORI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION FOR REVIEW

Whether a party who has no contractual or employment relationship with an employer can be an "employee or applicant for employment" for jurisidictional purposes under 42 U.S.C. Section 2000e-3.

LIST OF PARTIES

All of the parties in the United States Court of Appeals for the Sixth Circuits are listed in the caption.

CORPORATE PARTY AFFILIATION

Petitioner has no subsidiaries or affiliates, except that petitioner is part of a holding company known as Upper Valley Medical Center, a non-profit corporation which has two additional subsidiaries known as Dettmer Hospital and Piqua Memorial Medical Memorial Center.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

STOUDER MEMORIAL HOSPITAL, Petitioner,

v.

ANASTASIA S. CHRISTOPHER

PETITION FOR A WRIT OF CERTIORI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The June 24, 1991, opinion of the Court of Appeals of the Sixth Circuit, is reported at 936 F.2d 870 and appears in the Appendix. The July 24, 1991, judgment denying rehearing also appears in the Appendix. The pertinent opinions of the United States District Court, Southern District of Ohio, are unreported, but appear in the Appendix.

JURSIDICTION

The judgment of the Court of Appeals was entered on June 24, 1991. A timely petition for rehearing was denied on July 24, 1991.

The jursidiction of the Court is invoked under 28 U.S.C. Section 1254(1).

§2000e-2. Unlawful employment practices

Employer Practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§2000e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Respondent Anastasia Christopher is a nurse who received a Bachelor and a Master of Science Degrees from the Ohio State University and had previously filed a sex discrimination suit against a former employer which was resolved after litigation had been commenced.

During 1985, respondent was hired as a "pool nurse" at the petitioner hospital, began working "on call", generally part-time, and as needed in the labor, delivery and nursing areas of the hospital. She was eventually terminated from that position, and although she brought suit in the instant case for wrongful termination and Title VII liability under the termination of that job, the court dismissed those claims.

In the fall of 1986, respondent applied to the hospital for limited privileges to act as a private scrub nurse for her husband's obstetrical practice.

Although repsondent had never previously worked as a scrub nurse, she had assisted in surgery many years before at a different hospital. A private scrub nurses duties are to know specifically the procedures of the physician that she works for, to know the types of instruments he needs, to know when to anticipate his needs, to prepare the operating field, to prepare the patients, to maintain sterile technique and to care for the patient in immediate post-op areas until recovery; it is an extremely technical job. Private scrub nurses are employeed and paid by the physician for whom they work. They are scheduled by the physician, work under the physcian's control and supervision, follow the physician's orders, and are disciplined and terminated by the physician.

Because of some technical difficulties in processing resondent's application for privileges, temporary priviliges which had been granted to her, lapsed, and eventually, the respondent was denied her limited privileges to act as a private scrub nurse. While

respondent presented evidence that she was qualified, petitioner offered evidence that she was qualified, and this specific matter has been remanded to the trial court for further disposition.

As a result of the denial of privileges, respondent brought this action for relief under 42 U.S.C. §2000e-3 for employment discrimination and a state breach of contract claim against petitioner hospital, requested compensatory damages and reinstatement, and that she be granted her privileges.

Jurisdiction was founded upon 28 U.S.C. §1331 and §1343 and Title VII of the Civil Rights Act, 42 U.S.C. §2000e-3.

Prior to trial, petitioner filed a Motion in Limine objecting to repsondent's employment status, which was overruled on the first day of the trial.

During the trial, the court granted petitioner's motion to dismiss regarding the termination of certain of respondent's claims but retained jurisdiction in the case for the retaliation claim regarding respondent's denial of hospital privileges to be a private scrub nurse.

The court issued its decision on July 25, 1988, and granted judgment in favor of respondent on the Title VII denial of limited privileges claim, finding retaliatory discrimination.

Respondent moved to amend the judgment, or alternatively for a new trial, which was denied.

In its decision, the court noted that a remedy regarding privileges was at issue, and the parties entered into a negotiation which proved to be unsuccessful regarding that issue.

In its findings, the trial court held that respondent was not an independent contractor with respect to petitioner hospital, and earlier had found that no employment relationship would exist.

Appeal to the Sixth Circuit resulted in a remand of the case to the trial court on the issue of qualifications, but affirmed the trial court's determination that Title VII coverage applied to respondent's position. The Sixth Circuit did not change the factual determinations of the trial court that respondent did not have a contractual, nor an employment relationship, but adopted language from other cases regarding justification of jurisdiction when such relationship does not exist.

It is that determination upon which this petition has been filed.

ARGUMENT

The petitioner Stouder Memorial Hospital respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered June 24, 1991, rehearing denied July 24, 1991.

This is a case of first impression. While the broad category of relief sought by respondent was under the umbrella of Title VII, the action was limited to a discrimination claim based on retaliation and specifically alleged a violation of §704(a) of the Civil Rights Act [42 U.S.C. §2000e-3(a)], which states in part:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, . . . because he has opposed any practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." (Emphasis added)

There was no allegation of any other Title VII violation; all matters tried and argued were limited to the application of that specific section of the Act.

As early as the case of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), the Supreme Court noted a difference the retaliation

section and other sections of the Civil Rights Act.

> "The former section [§2000e-2(a)(1)] generally prohibits racial discrimination in any employment decision while the latter [§2000e-3(a)] forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment." *Id.* at 796.

Unfortunately, in the multitude of cases (and there are many) cited under §704, most are not single issue cases but mixed motive cases that join allegations of retaliation and other forms of discrimination protected under §703 (e.g. race, religion, sex, etc.).

Therefore, in interpreting the protection afforded by the statute, most courts have had a choice of which language (§703 or §704) to use in making decisions, and the language is different.

Section 703 provides, in pertinent part:

> "(a) it shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, privileges of employment, because of such individual race, color, religion, sex, or national origin; . . ." (Emphasis added).

This language is completely different than §704.

It probably goes without saying that if Congress had intended to "lump" retaliation discrimination with other forms of discrimination in §703, it could have done so; but it specifically did not. And that is what the Supreme Court quote beginning this brief is intended to convey - there is a difference between retaliation and other forms of discrimination.

Congress recognized that the discrimination that takes place in retaliation cases is different; so is the language of the statute.

The fact is that there is not only a language distinction but a practical distinction, and valid reasons for the differentiation. The criteria of a violation of §703 reasons do not require any pre-condition. Individuals already "possess" their race, sex, national origin, etc. However, an individual does not "carry" retaliation around; it must be affirmatively earned and disclosed - there is a pre-condition.

The trial court made a factual finding, which was not reversed by the appellate court, that respondent had no intended "employment relationship" with petitioner. The appellate court found no "contractual relationship". Based upon these findings, a reasonable reading of §704 should divest the Court of its jurisdiction. The statute is very clear that the respondent (or any claimant) must be an employee or applicant for employment.

It was also determined that respondent was not an employee, and no relationship such as an independent contractor existed either. Neither did the term applicant apply - because "employment" is still the criteria for an applicant, something which respondent failed to meet.

However, both Courts then proceeded to go beyond the language of the statute, and expanded the coverage of §704 into unchartered waters beyond employment.

No case cited by either Court used the exclusive language of §704 to justify its position.

In each instance, the Court used cases which interpreted other discrimination statutes and not the language of the retaliation statute.

The statutory language alone should be sufficient to deny jurisdiction based upon the factual finding of no employment

relationship and the finding that the respondent was neither an employee nor an independent contractor. "The basis of all relief under Title VII is that the claim must necessarily involve an employment relationship." *Diggs v. Harris Hospital - Methodist, Inc.*, 847 F.2d 270, 272 (5th Cir. 1988), *cert. denied,* 109 S.Ct. 394 (1989).

However, the Court justified its position, expanding the coverage of a third party, without recognizing the statutory limitations that those cases discuss.

Both Courts relied a great deal on *Sibley Memorial Hospital v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973).

The facts of that case were that a male duty nurse alleged discrimination based on sex for a hospital's refusal to refer patients to him as a private duty nurse. The plaintiff in that case had no relationship with the hospital, but received referrals from a registry that was maintained by the hospital. Despite the fact that he was not an employee of the hospital, the Court held that since the action of the hospital affected him as an "individual", that §703 applied. However, in doing so, the Court specifically quoted §703 which specifically expands coverage to "individuals;; rather than employees or applicants for employment as the limiting language of §704 provides. However, the same circuit, in *Spirides v. Reinhardt,* 613 F.2d 826 (D.C. Cir. 1979), seems to reject *Sibley*. In *Spirides* the court held that for a determination of Title VII coverage, a factual review of the "economic realities" of the relationship should be the criteria. In addition, the "right to control the 'means and manners' of the worker's performance is the most important factor." *Id.* at 831. More importantly, that court found that individuals who were independent contractors or those not directly employed by such an employer are unprotected by the statute. *Id.* at 829. Respondent was held not to be an independent contractor by the appellate court in this case.

The appellate court also relied upon cases of *Gomez* and *Pao*. Both of those cases are irrelevant to the factual case because again they are not §704 cases, and they are further distinguished by their facts.

In *Gomez v. Alexian Bros. Hospital*, 698 F.2d 1019 (9th Cir. 1983), the District of Columbia Circuit allowed a physician to state a Title VII action for refusal of a hospital to grant him by staff privileges. However, once again, it was brought under §703 and not under the retaliation statute. More importantly, the court recognized that in order for Title VII protection to apply "there must be some connection with an employment relationship." *Supra* at 1021. Further, that case is distinguishable because it involved a corporation that was the employer of a number of physicians who rendered medical services as part of a group medical practice.

In *Pao v. Holy Redeemer Hospital*, 547 F. Supp. 484 (E.D. Pa. 1982), while a cause of action was recognized in the decision, it was brought under §703. It does not cite (nor does it involve) the appropriate relevant statute: §704.

If the respondent is not an employee, and if she is not an independent contractor, then this Court should distinguish and determine the applicability of §704 to her relationship to petitioner. As *Spirides*, said, independent contractors are not covered. See also *Falls v. The Sporting News Pub., Inc.*, 834 F.2d 611 (6th Cir. 1987).

Then, how can Title VII cover a party even further removed from that direct relationship?

The issue of Title VII coverage to third parties as opposed to employees has generated a great deal of interest in the circuits; the cases seem to cross all issues, using analogies of various other social legislation and provide authority for a broad spectrum of conclusions.

However, those cases fail to review their facts under the limited view as provided by §704 of the Act.

The more relevant argument should come from cases that interpret §704 alone, and not a combined case with mixed language.

In *Hale v. Marsh,* 808 F.2d 616 (7th Cir. 1986), the court phrased its issue: "whether an employer who retaliates against another *employer's employee* for that employee's having opposed charged, etc. unlawful discrimination against himself or somebody else violates the retaliation . . . provision of Title VII of the Civil Rights Act of 1984, 42 U.S. §2000e-3(a)." *Id.* at 618.

Hale was an employee of the federal government who helped another individual file a racial discrimination claim against the Corps of Engineers. An employee of the Corps wrote a letter of complaint to the head of Hale's employer complaining of Hale's action, and as a result of the letter, Hale filed a retaliation claim against the Corps (Army).

The Court noted that the basic language of the statute was contrary to the plaintiff's assertion. The statute [§2000e-3(a)] forbids 'an employer to discriminate against any of *his* employees or applicants for employment . . . . ' *Supra* at 619 (Emphasis supplied).

In denying the claim, the court acknowledged distinctions between the remedies available, however it concluded that liability (or jurisdiction) should not be extended under §704 where the retaliator is not the victim's employer. *Supra* at 620.

Following this principle in the instant case, since there was no employment or contractural relationship, respondent could not be the employee of the petitioner for purposes of §704 relief. In order to allow jurisdiction in this case, the court must make a finding of an employment relationship, or a finding that the respondent is an employee or applicant with petitioner - that is the language of the statute, and those findings have been rejected by both lower courts.

This requirement of a relationship was also discussed in *Hishon v. King & Spalding,* 467 U.S. 69, 81 L.Ed.2d 59, 104 S. Ct. 2229 (1984), where a law firm associate brought a Title VII action under §703 to enforce rights against the partnership. While the statute is different, even under that section (§2000e-2), the Supreme Court stated that before Title VII attaches to the specific aspects of a case, a "contractual relationship of employment must be established." *Supra* at 74 that finding has been rejected herein.

By allowing jurisdiction, the appellate court has expanded the language of §704 to the far reaching position that the term "employee" can mean any individual who is effected by an employer's action. This is the definition that the courts have characterized as "magnificent circularity." *Broussard v. L.H. Bossier Inc.,* 789 F.2d 1158, 1160 (5th Cir. 1986). This definition should be rejected because Title VII is not an anti-discrimination law, it is an employment discrimination law.

Further, this recognition completely ingores the specific language of the statute and the legislative intent of Congress. It also ignores logic, because if that was the intent, then why didn't Congress ban all discrimination under one section.

"While it would be a desirable goal to eliminate racial discrimination in all business enterprises, it does not appear that Congress intended such a broad objective for Title VII, The emphasis on the word 'employment' in the legislative history supports such a conclusion." *Cobb v. Sun Papers, Inc.,* 673 F.2d 337, 340 (11th Cir. 1982).

Section 704 must be more direct in its relationship, because it is more direct. It is clear that §704 is limited to jurisdiction to employees or applicants for employment.

If the court allows this vague relationship to substantiate jurisdiction, the system will fail for §704 cases. How will the alleged lawful party know that it has discriminated? How will the alleged wrongful party know that the claimant is a protected party?

In this case, for example, if respondent was not protected (i.e. had no previous EEOC claim upon which to base her §704 suit), and if petitioner denied her application for privileges, there would be no claim. We must assume that petitioner can deny privileges for any reason (or no reason) and be justified in doing so without violating a protected issue such as sex or race.

But if the claimant is protected by a previous claim and has no other discrimination claim, and if the petitioner rejects for no reason, how is petitioner to defend the unknown discrimination.

If the claimant meets her prima facie proof, the burden shifts to the employer, who has no evidence of rejection. The employer has no knowledge of the protected individual (or the previous claim), and therefore, had no reason to make a specific denial. The employer would then be forced to manufacture a reason for denial, and all because the employer did not know, and could not know of the previous claim.

In requiring a direct contractural relationship, at least the employer has the opportunity and ability to gain some knowledge about the applicant, and the employer can more legitimately make its employment decision.

In retrospect to jurisdictional application, in interpreting the statutory language, each of these cases cited below can be found to be justified because a "claimant" can be an "individual" under §703.

However, the term "individual" is not a definitional term under §704. Therefore, in a §704 case, the claimant must meet the language of the statute, and in this case, the claimant must be an "employee or applicant for employment." The word 'employee,' however broadly defined is still 'employee . . . . ' *Wheeler v. Hurdman,* 825 F.2d 257, 276 (10th Cir. 1987).

In this case, not only did the court fail to make such a finding, the courts found that there was no relationship between respondent

and petitioner (employment or contractural), but the courts went further afield and used cases interpreting §703 to justify jurisdiction. This was error.

CONCLUSION

The Equal Employment Opportunity Commission and the federal courts have seen a great increase in the number of cases filed in recent years, and thousands of cases are being filed to gain equal employment rights for individuals. Each time one of these cases is filed, and even each time a claim is brought before the EEOC, a new individual is brought under the broad definition of §704 of the Civil Rights Act as an additional statute upon which to bring a later employment discrimination case.

Accordingly, even as discrimination claims grow under §703 (for race, sex, religion, etc.), an equal number of cases is created for possible claims under §704 - later retaliation. The numbers that are being produced are staggering for the court system and the administration of that system.

In order for the system to handle these cases, the courts must have a reasonable explanation of what relationship §704 will require. Does §704 cover independent contractors? Does §704 cover third parties who have no employment or contractural relationship with the claimant? Or does §704 limit itself to the statutory language that the claimant must be an "employee or applicant for employment?"

These are issues that are not only unanswered, they require an answer for purposes of judicial economy and fair and equitable interpretation by the circuits.

A projected syllabus of the case to be decided seems somewhat simplistic, since it follows the language of the statute, but the failure of the Courts below to limit their interpretation to the statutory language of §704 seems to reject that projected syllabus:

"In order for §704 of the Civil Rights Act to be applicable, a claimant under that section must be an employee or an applicant for employment."

Respectfully Submitted,

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APPENDIX

A. Judgment Denying Rehearing
July 24, 1991

B. Decision of the Court of Appeals
June 24, 1991

C. Order Denying Motion for New Trial
March 30, 1990

D. Journal Entry Modifying Decision on Remedy
February 5, 1990

Case Nos. 90-3400/3429
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

ANASTASIA S. CHRISTOPHER

Plaintiff - Appellee Cross - Appellant

v.

STOUDER MEMORIAL HOSPITAL

Defendant - Appellant Cross - Appellee

BEFORE: JONES and SUHRHEINRICH, Circuit Judges; and FEIKENS, District Judge.

Upon consideration of the petition for rehearing filed by the appellant cross - appellee, the court concludes that the issues raised were fully considered upon the original oral argument and decision of this case,

It is ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

ss Leonard Green, Clerk

Filed July 24, 1991.

Nos. 90-3400/3429

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Anastasia S. Christopher,
Plaintiff-Appellee,
Cross-Appellant,

v.

Stouder Memorial Hospital,
Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Southern District of Ohio.

Decided and Filed June 24, 1991

Before: JONES and SUHRHEINRICH, Circuit Judges; and FEIKENS, Senior District Judge.*

NATHANIEL R. JONES, Circuit Judege. Defendant-appellant Stouder Memorial Hospital ("Stouder"), appeals the trial court's judgment for the plaintiff-appellee Anastasia Christopher in this Title VII civil rights action. Christopher cross-appeals the court's refusal to award her back pay on her retaliation claim. [1]

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*The Honorable John Feikens, Senior District Judge for the Eastern District of Michigan, sitting by designation.

I.

Christopher, a female nurse, was awarded a B.S. degree in nursing from Ohio State University in 1974 and a M.S. degree in nursing from the same institution in 1977, with particular emphasis in maternal and child health. She is married to Charles Christopher, M.D., a practicing obstetrition and gynecologist.

From 1978 until 1983, Ms. Christopher was a faculty member at the Wright State University School of Nursing. In June 1983, she filed a sex discrimination claim against Wright State. Her claim eventually resulted in a Title VII lawsuit which was resolved prior to trial. No details about Christopher's charge or settlement are part of the record in this case.

During the lawsuit, Christopher's husband, Charles, was also experiencing difficulties with his hospital, where he was head of obstetrics, and the couple decided to move to Troy, Ohio. Charles formed a partnership with Dr. Gerald Dysert, who was performing deliveries and gynecological surgery at Stouder when Dr. Christopher joined him in practice.

During the spring of 1985, Ms. Christopher was hospitalized for surgery at Stouder. During her recovery she discussed the possibility of nursing employment at Stouder with Sally Swisshelm, Director of Nursing. Christopher told Swisshelm that she had had discussions with her husband and his partner about working as a "scrub nurse" for them during surgery. Stouder hired Christopher on June 10, 1985. Her formal title was "pool nurse" although it appears she had been hired to work in some sort of capacity as a trainer for other nurses in the Ob/Gyn department.

After a brief period, Christopher's uncertain status resulted in tension with the other nurses. This was in part because she was attempting to train nurses many of whom [2] had been at Stouder for many years. One of Christopher's duties during her work at Stouder was to prepare the obstetrical nurses to assist as scrub nurses during cesarean section procedures. Apparently, everyone

agreed that Christopher herself needed training in this area, since she had very little prior experience as a scrub nurse. As a result, Christopher began to train in the Stouder operating room in July and August of 1985. The apparent plan was that Christopher would pass on her training to other nurses in obstetrics, rather than sending the nurses to another hospital for training.

In July, 1985, Christopher applied to Stouder to obtain limited privileges to act as a private duty scrub nurse at the hospital. The procedure for deciding on privileges was that the application would remain with the medical staff secretary until complete. The application would then be passed on to the Executive Committee of the Medical Staff, then to the full medical staff and finally to the Board of Trustees. During the period in which the application was being considered, the hospital's president was empowered to grant temporary privileges for a period of ninety days. The Executive Committee approved this request on August 6, 1985, and John Grubb, President of Stouder, granted Christopher temporary privileges on October 23, 1985.

After her temporary privileges were granted, Christopher began to act as a private scrub nurse for her husband and his partner. A scrub nurse's duties are primarily to prepare instruments for surgery, to hand them to the surgeon during the operation and to clean up after the operation. As of 1985, there were only two nurses acting in the capacity of private scrub nurse. According to Ms. Nagle, operating room supervisor, there had been only one prior experience with a private duty scrub nurse in her thirty years experience with surgery at Stouder. Normally, the procedure at Stouder was for regular nurses employed by the hospital to act as scrub nurses.

Private duty scrub nurses are normally paid by the [3] doctors with whom they work. They are not employees of the hospitals itself, and the hospital does not cover their insurance or benefits. However, during her training period, and during the tenure of her

temporary privileges status, Christopher was paid and insured by the hospital.[1]

In January, 1986, Ms. Swisshelm concluded that the obstetrical nurses were not obtaining their new skills fast enough and hired a special obstetrics supervisor to perform the training tasks Christopher was hired to perform. Grubb approved this new plan, and on January 10, 1986, Christopher was informed that her services as a clinical nurse specialist would no longer be needed. It is not clear from the record whether Christopher was actually fired at this point, or whether she remained on the schedule as a "pool nurse."

Christopher objected to Stouder's decision and hired counsel to represent her against the hospital.[2] In the meantime, her temporary privileges had expired. Apparently, one of her references had not responded to the hospital's request for a reference letter because he had moved his practice. He was later contacted and Christopher's file was completed on January 26, 1986.

Before Christopher's application for limited privileges was reviewed by the Executive Committee, Ms. Swisshelm was asked to review Christopher's competence. In a memo dated January 31, 1986, she questioned Christopher's training ability and characterized her as "disruptive" and "untrustworthy." She noted that Christopher had written on doctor's progress notes in [4] contravention of hospital policy even after being advised it was inappropriate. She also asserted that Christopher had caused "chaos" in both obstetrics and surgery.

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[1]Christopher's pay arrangement seems to have been a temporary one indulged in by the hospital because Christopher's husband and his partner were trying to save for some new laser equipment. The details of this pay arrangement are not crucial for the resolution of this appeal.

[2]Christopher's complaint included a Title VII claim with regard to her "dismissal" from her trainer position, as well as a state claim for breach of contract. However, those claims were both dismissed and that decision has not been appealed.

Dr. Mark Hess, a member of the Executive Committee, also prepared a memorandum on Christopher. At the request of the Chief of Medical Staff, Dr. Ellenbogen, he contacted L.R. Jordan, chief executive of Miami Valley Hospital, about Christopher's work when she was stationed there by Wright State. According to Dr. Hess's memo, Jordan said that Christopher's tenure at Miami Valley had been "marked by severe turmoil," that she had "assumed authority far beyond what was proper," including writing prescriptions for her husband's countersignature, and that she had an "endless series of conflicts with many people." He also advised that Miami Valley insisted on her transfer and she thereupon sued for sex discrimination.

On February 4, 1986, the Executive Committee voted unanimously to deny Christopher's application for limited privileges. On March 20, 1986, Christopher "withdrew" her prior application for limited privileges and filed a second more limited application. It appears she filed the second application because she was informed that her first application had been too broad. It seems Christopher had asked for permission to do a number of procedures normally handled exclusively by doctors at Stouder. Christopher's second application was supported by recommendation letters from her husband, Dr. Dysert and Dr. Kevin Horvath, a pediatrician practicing at Stouder.

After consulting with Dr. Ellenbogen, Chief of Staff, Ms. Nagle prepared a set of standards for private scrub nurses for the hospital. These standards included a requirement that private scrub nurses have at least one year of experience as a scrub nurse. Evidently, these standards were prepared in February, 1986, but were not approved by the hospital until 1987. Nonetheless, the standards were used to prepare a questionnaire for the other surgery nurses to review Christopher's [5] qualifications. Virtually, all of the nurses surveyed found that Christopher was deficient with respect to the standards. These results were made available to the Executive Committee which on May 6, 1986, again voted to deny Christopher limited privileges.

This action followed and the parties agreed to conduct the trial before a magistrate. A trial was held from July 11-13, 1988.

Dr. Hess was the only member of the Executive Committee to testify at trial. During his testimony he denied that he had considered Christopher's prior Title VII lawsuit for sex discrimination at Miami Valley in deciding how to vote on Christopher's privileges application. However, the magistrate credited testimony by Christopher as to two conversations she had had with Grubb and with Dr. Hess. Christopher testified that she had talked to Grubb by telephone in January of 1986 and attempted to negotiate the issue of her privileges. He reportedly responded, "If you hadn't had some legal action prior to this, this might not have occurred." J. App. at 23. Christopher also recalled a conversation with Dr. Hess on March 9, 1986, in which he reportedly also told her that she was having difficulties because of her prior legal action at Miami Hospital.

While the court dismissed all of Christopher's other claims at the close of plaintiff's case, he found that she had established her claim of retaliation. In reaching this result the court found that Christopher's prior sex discrimination action had been mentioned enough times in the process surrounding her applications for limited privileges to warrant a conclusion that Stouder would not have made the same decision absent the factor of the prior suit. The court also noted that much of the evidence used to deny Christopher's second application "seems to have been manufactured to guarantee the result." J. App. at 31. Specifically, the court found that the scrub nurse standards drafted by Ms. Nagle required one year experience as a scrub nurse, which made Christopher [6] ineligible. The court found these standards "plainly discriminatory against the private scrub nurse concept since Mrs. Nagle admitted on the stand that nurses were sometimes hired directly from nursing school into the operating room at Stouder." *Id.* Finally, the court concluded that Ms. Nagle could have easily learned that Christopher would be excluded by the one-year requirement by looking at her file.

Despite the court's finding in favor of Christopher on her retaliation claim, it found that Christopher was not entitled to back pay. While there was some initial confusion about whether the court had the authority to award back pay damages against Stouder when the hospital was not Christopher's employer, the court ultimately determined that back pay was not appropriate because Christopher had failed to prove damages.

Recognizing that the hospital had a strong interest in ensuring that Christopher was qualified to be a private scrub nurse, and at the same time, acknowledging that the process used to evaluate Christopher had been flawed, the court ordered the parties to negotiate a neutral means for evaluating Christopher's abilities as a scrub nurse. When the parties failed to reach a reasonable solution, the court ordered that Christopher work for six weeks for two neutral doctors, who would independently evaluate her performance. When this too became unworkable, due in part to Stouder's refusal to cooperate, the court ordered that Christopher be granted limited privileges to work as a private scrub nurse at Stouder for any doctor who would employ her. The court was careful to make clear that it was not forcing Christopher into an employment relationship with the hospital. Rather, it was simply undoing the discriminatory application of heightened standards which had been applied to Christopher.

II.

Stouder first contends that the court lacked jurisdiction to hear this case because Christopher was neither an [7] "employee" nor an "applicant for employment" at Stouder. The provision of the Civil Rights Act which enables plaintiffs to sue for retaliation provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer *to discriminate against any of his employees or applicants for employment* . . . because he has opposed any practice made an unlawful employment practice by this subchapter or because he had made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §2000e-3 (emphasis added). While it is true that Christopher was not a direct employee of Stouder, we find that Stouder's control over Christopher's ability to practice as a private scrub nurse sufficiently impacted her employment opportunities to bring her claims within the intended scope of §2000e-3.

As the trial court noted, our caselaw requires that "[t]he term 'employee' in Title VII 'must be read in light of the mischief to be corrected and the end to be attained.' " J. App. at 70 (Order denying motion for new trial, quoting *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983)). Further, we have repeatedly said the "Title VII of the Civil Rights Act should not be construed narrowly." *Tipler v. E.I. du Pont de Nemours and Co.* 443 F.2d 125, 131 (6th Cir. 1971). In this spirit, several courts have held that Title VII does not require a formal employment relationship between the plaintiff and the defendant. Rather, a plaintiff is protected if the defendant is one "who significantly affects access of any individual to employment opportunities." *Doe v. St. Joseph's Hosp.,* 788 F.2d 411, 422-25 (7th Cir. 1986) (doctor stated a claim under Title VII when hospital denied staff privileges even though doctor was not an employee of the hospital); *Gomez v. Alexian Bros. Hosp.,* 698 F.2d 1019, 1021 (9th Cir. 1983) (finding a cause of action under Title [8] VII when " 'a defendant subject to Title VII interferes with an individual's employment opportunities with another employer.' " (quoting *Lutcher v. Musicians Union Local 47,* 633 F.2d 880, 883 n.3 (9th Cir. 1980)).

The trial court in this case relied on the D.C. Circuit's opinion in *Sibley Mem. Hosp. v. Wilson,* 488 F.2d 1338 (D.C. Cir. 1973) to find that Christopher had jurisdiction to sue. *Sibley Mem. Hosp.* concerned a sex discrimination claim under Title VII by a private duty nurse against a hospital. The basis of the plaintiff's claim was that the hospital's Nursing Office would not refer the nurse, who was a male, to female patients who requested a private duty nurse.

This action by the hospital was in contravention of its own policy of referring patients to the next available private nurse in its register. The defendant hospital moved to dismiss on the ground that the plaintiff was not in an employer-employee relationship with the hospital and therefore the court did not have jurisdiction to hear the claim. However, the district court found that the plaintiff stated a claim under Title VII and the D.C. Circuit affirmed.

In its *Sibley Mem. Hosp.* opinion, the court began by pointing out that "The Supreme Court has said that the Congressional objective in Title VII is 'plain from the language of the statute,' and that it is 'to achieve *equality of employment opportunities*[.]' " *Id.* at 1340-41 (emphasis original) (quoting *Griggs v. Duke Power Co.,* 401 U.S. 424, 429 (1969)). The court then reasoned that in certain circumstances control over access to employment may reside in organizations such as unions or employment agencies "which have not a remote but a highly visible nexus with the creation and continuance of direct employment relationships between third parties." *Id.* at 1342; *see* 42 U.S.C. §2000e-2 (b) and (c). From these premises, the court reasoned: [9]

> To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341. The court went on to determine that the hospital, while not the plaintiff's employer, was in the same position to interfere with the plaintiff's employment opportunities as unions or employment agencies, and therefore, "neither the spirit nor, more essentially, the language of the Act" prohibited the plaintiff from proceeding against the defendant hospital. *Id.* at 1342.

The facts of the instant case are directly analogous to the situation in *Sibley Mem. Hosp.* Like the nurse in *Sibley*, Christopher

cannot pursue her employment opportunity of working as a private scrub nurse if Stouder does not grant her limited privileges. If Stouder denies those privileges to Christopher on impermissible grounds, it is, in effect, denying her employment on impermissible grounds, despite the fact that it does not pay her salary.

Stouder argues that *Sibley, Gomez,* and *Doe* are distinguishable because all of those cases were actions brought under §2000e-2, which allows a broader range of persons to sue than §2000e-3 upon which Christopher relies. §2000e-2 provides in relevant part:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire . . . *any individual,* or otherwise discriminate against *any individual* with respect to his compensation, terms, condition, or privileges of employment[.]

42 U.S.C. §2000e-2 (emphasis added). By comparison, [10] §2000e-3 refers to the protected class as "employees or applicants for employment." *See* 42 U.S.C. §2000e-3 (quoted *supra.*). Stouder argues that the difference in the language of the two provisions indicates a Congressional intent to provide less coverage for retaliation than for other forms of discrimination under the Act.

While Stouder's position has some logical appeal at first glance, we find it is ultimately not persuasive. First, while the courts in *Doe, Gomez,* and *Sibley Mem. Hosp.* do rely, to some extent, on the "any individual" language of §2000e-2, this language is not the sole basis of these holdings. For example, in *Sibley Mem. Hosp.,* the court makes much of the fact that the general remedial section of Title VII does not refer only to any "employee" but provides recourse to "persons aggrieved." *See* 42 U.S.C. §2000e-5(b); 488 F.2d at 1341-42; *see also Gomez,* 698 F.2d at 1021. The court states: "The fact that the Act purports to provide remedies for a class broader than direct employees is a strong indication that the proscriptions contemplated by [§2000e-2] reach beyond the immediate

employment relationship." *Sibley Mem. Hosp.*, 488 F.2d at 1341. It is important to note that the remedial section to which the court refers, §2000e-5, applied equally to plaintiffs suing under §2000e-2 and §2000e-3. Thus, the courts in reaching their conclusions in *Sibley* and *Gomez,* were not relying on the "any individual" language of §2000e-2, but rather, were discerning the meaning of "employee" in the Title VII context by looking to the intent and scope of Title VII as whole.

In addition, as discussed above, *Sibley Mem. Hosp.* extensively discusses the fact that §2000e-2 applies to unions and employment agencies whose actions might interfere with a person's access to employment opportunity with other employers though these organizations might not be serving as an employer. Significantly, §2000e-3 also explicitly applies to unions and employment agencies. Thus, if the analogy between the hospital's interference with Christopher's employment [11] as a private scrub nurse in the instant case, and the interference by a union or employment agency in the employment opportunities of its members or clients holds, then a plaintiff alleging interference by a defendant in the plaintiff's employment with third parties ipso facto states a claim under either §2000e-2 or §2000e-3. *See Doe,* 788 F.2d at 423 ("Congress presumably did not intend to allow the hospital to exploit its power to grant or deny staff privileges in order to discriminatorily interfere with [plaintiff's] employment opportunities."); *see also Pao v. Holy Redeemer Hosp.*, 547 F.Supp. 484, 494-95 (E.D. Penn. 1982) (following *Sibley Mem. Hosp.* to find that hospital's denial of staff privileges to a doctor was sufficient to state a claim under Title VII).

In the instant case, there was ample evidence presented at trial to demonstrate that Stouder was an organization which was capable of and in fact did affect Christopher's ability to engage in her employment as a scrub nurse. As the trial court put it,

> By discriminating against Plaintiff and refusing to grant her privileges to work in its facility, Defendant realistically

> prevents Plaintiff from performing the job for which she was hired by the physicians. This clearly interferes with Plaintiff's employment relationship with the hiring physicians and with her opportunity to perform her work.

J. App. at 73 (Order denying motion for new trial). As the goal of Title VII is to preserve employment opportunity, we can see no reason to conclude that Congress intended Title VII to prohibit discrimination by a non-employer defendant on the basis of race or sex, and to allow the same non-employer defendant to discriminate against a person who engages in protected activity under Title VII. In both instances the acts of the non-employer defendant have the effect of denying the plaintiff employment based upon impermissible grounds under the Act. Thus, we find that the trial court had jurisdiction to hear Christopher's §2000e-3 claim based upon the [12] principles and reasoning articulated in *Sibley Mem. Hosp.* and its progeny.

Stouder also asserts that the trial court did not have jurisdiction to hear this case because Title VII does not apply to "independent contractors." In this argument, Stouder asserts that Christopher's relation to the hospital is analogous to that of an independent contractor. *See Falls v. Sporting News Pub. Co.*, 834 F.2d 611, 613 (6th Cir. 1987) (while the term "employee" is to be construed broadly in Title VII, it is not meant to reach independent contractors). In the instant case, the trial court specifically found that "Plaintiff would not be a hospital employee nor would she be an independent contractor with respect to the hospital." J. App. at 73. The court's finding is supported by the record. As a private scrub nurse, Christopher would not be paid by the hospital nor would she receive benefits or insurance from the hospital. Her direct employment relationship would be with the doctor who hired her to assist in surgery for each specific operation. While Stouder would provide Christopher with equipment and facilities to perform her work, Stouder would not have any control over her work, except to the extent that it could impose its uniform safety standards as it does on all persons who have staff privileges in the

hospital. Finally, at no time would Christopher be required to perform services for the hospital itself. On these facts, no contractual relationship would exist between Stouder and Christopher either as an employee or as an independent contractor.[3] For these reasons, we find that Christopher does not fall within the independent contractor exception to Title VII. [13]

In sum, we find that the trial court properly had jurisdiction over Christopher's claims.

III.

Stouder next argues that the trial court did not apply the correct legal standards in concluding that Christopher had made out a case of retaliation under Title VII. Specifically, Stouder contends that the trial court failed to find that Christopher was "otherwise qualified" for the position she was allegedly denied based upon retaliation, and that Christopher failed to show that the Stouder hired a less qualified scrub nurse after her application was denied.

As the trial court correctly noted, the elements of a prima facie case of retaliation are as follows:

> (1) that plaintiff engaged in an activity protected by Title VII; (2) that the exercise of his [or her] civil rights was known by the defendant; (3) that, thereafter, the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action.

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[3]The fact that Christopher is neither Stouder's direct employee nor of an independent contractor does not undermine the fact that Stouder has exclusive control over Christopher's ability to practice as a private scrub nurse. As described above, even though Christopher does not provide any services for the hospital, her ability to function as a private scrub nurse is contingent upon Stouder's grant of limited privileges. Thus, while Christopher's relationship with Stouder is not contractual, she nevertheless states a claim under Title VII based upon her allegations that Stouder's acts of retaliation prevented her from entering into employment contracts with private doctors.

Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir. 1987). Based upon this framework, the trial court found that Christopher had met her prima facie burden. Stouder argues that the trial court erred in applying this framework alone, without making the other findings required for a prima facie case of discrimination under Title VII under *McDonnell Douglas v. Green,* 411 U.S. 792, 802 (1972). *Wrenn* made clear that "[p]roof of a retaliation claim under Title VII is governed by *McDonnell Douglas*[.]" *Wrenn,* 808 F.2d at 500. Key to a finding of discrimination under the *McDonnell Douglas* framework is proof that the plaintiff "applied and was qualified for a job for which the employer was seeking applicants," and "that, despite his qualifications, he was rejected". 411 U.S. at 802. Stouder argues that [14] Christopher's retaliation claim is fatally flawed because she failed to meet her burden of demonstrating that she was qualified to receive limited privileges as a private scrub nurse. In addition, Stouder asserts that the trial court, in finding that Christopher had made out her claim of retaliation, never made an explicit finding that Christopher was qualified for the position.

After weighing the testimony and evidence before it, the trial court concluded that "Mrs. Christopher has persuaded this Court that she would have received limited privileges but for retaliation against her on the basis of her prior claim against Wright State." J. App. at 30-31. Christopher argues that the trial court's finding that she would have received limited privileges but for Stouder's retaliationis an implicit finding that she was qualified to perform the job of a scrub nurse. However, as Stouder points out, the court seemed to have serious doubts about Christopher's qualifications. For example, at the end of its memorandum opinion the court stated

> Ms. Christopher seeks reinstatement of her limited privileges and to that she is entitled. Stouder is, however, entitled to ensure that she is *technically competent as a scrub nurse, since there were some valid concerns expressed about that at the time she was at the hospital* and it has now been two and one-half years since she has acted

> in that capacity. Accordingly, counsel for the parties are directed to consult with a view to devising a neutral objective measurement of Ms. Christopher's present competence to act as a scrub nurse.

J. App. at 33-34 (emphasis added). In addition, the court prescribed a six-week trial procedure to determine Christopher's qualifications for the scrub nurse position. This procedure required medical evaluators to observe Christopher and file reports. As to the reports, the court stated that, "[e]ach such report shall include the doctor's opinion as to whether Mrs. Christopher is qualified for employment as a gynecological and obstetrical private [15] duty scrub nurse." *Id.* at 46.

Christopher argues that the court was primarily concerned with her present qualifications as it had been several years since she acted as a nurse due to this litigation. However, the court specifically noted that there had been some valid concerns about her qualifications at the time she was at the hospital. *Id.* at 33-34. Further there is little or no evidence in the record that demonstrates Christopher's qualifications to act as a private scrub nurse, and this evidence came from her husband and her husband's partner. As Stouder correctly points out, "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications." *Griggs v. Duke Power Co.,* 401 U.S. 424, 430 (1971). Further, "qualification of the complainant is the pivotal component of the *McDonnell Douglas* prima facie case." *Williams v. Boorstin,* 663 F.2d 109, 118 (D.C. Cir. 1980) (emphasis omitted), *cert. denied,* 451 U.S. 985 (1981). Thus, we hold that is was error for the trial court not to make an explicit finding that Christopher was qualified to act as a scrub nurse before concluding that she was the victim of discrimination. We therefore remand for the district court to determine whether Christopher was qualified to act as a private duty scrub nurse at the time the alleged discrimination took place.

In addition to its assertions regarding the trial court's failure to find that Christopher was qualified, Stouder asserts that the district

court erred in failing to require Christopher to show that other less qualified applicants were granted privileges at Stouder after she was denied such privileges. As Stouder correctly points out, the Supreme Court in *McDonnell Douglas* suggested that plaintiffs seeking to create an inference of discriminatory failure to hire must show, in addition to membership in a protected class and qualifications, that the defendant continued to accept applicants for the position from equally qualified person. 411 U.S. at 802. However, Stouder's premise that failure to make such a finding is [16] reversible error is based upon a misapprehension of the law.

It is well settled that if a plaintiff presents direct evidence of discrimination, she need not proceed under the *McDonnell Douglas* formula. *Blalock v. Metal Trades, Inc.*, 775 F.2d 703, 707 (6th Cir. 1985). As the court explained,

> Direct evidence and the *McDonnell Douglas* formula are simply different evidentiary paths by which to resolve the ultimate issue of defendant's discriminatory intent. "Where the evidence for a prima facie case consists . . . of direct testimony that defendants acted with a discriminatory motivation, if the trier of fact believes the prima facie evidence the ultimate issue of discrimination is proved; no inference of discrimination is required."

Id. (citations omitted). In the instant case, the trial court found that Stouder raised its prior qualifications standards and denied Christopher limited privileges in retaliation for her prior sex discrimination suit. The court based its finding upon Christopher's own testimony of discussions she had had with Dr. Hess and Grubb, and the fact that reference to Christopher's prior suit appeared in Dr. Hess's memo to the Executive Committee. Thus, there was direct evidence upon which the court could find that Stouder acted in a discriminatory manner with regard to Christopher. In other words, there was no need for Christopher to produce evidence of retaliatory motive under the *McDonnell Douglas* framework because the court did not have to infer from Stouder's

actions with other applicants that the hospital discriminated in this case.

Stouder also argues that since Christopher's privileges were denied, the hospital has not granted privileges to any private scrub nurse who did not have at least one year of experience. Thus, Stouder argues, it has not [17] discriminated against Christopher. Rather, the hospital has simply applied its neutral qualification standards across the board to all applicants. However, even if we accept Stouder's claims that it has consistently applied the one year experience standard to applicants after Christopher, this still does not refute the evidence that the hospital raised its prior standards in Christopher's case in order to deny her privileges for impermissible reasons of retaliation. Therefore we find that the trial court's determination that Stouder acted with a retaliatory motive is not clearly erroneous.

IV.

Stouder's last contention is that the trial court mistakenly found that Stouder's new standards for the hiring of private scrub nurses, written by Ms. Nagle, were retaliatory because Ms. Nagle testified that she did not know that Christopher had filed a prior discrimination action. As Christopher points out, this alleged error is based upon a misapprehension of what the trial court found. In fact, the court did not determine that the writing of the standards was retaliatory, although it hinted that they may have been written to include a one year experience requirement which would exclude Christopher. Rather, the discriminatory act was the application of these new higher standards to Christopher by the Executive Committee and other decisionmakers. It was this application of the standards which "differed substantially from the bases upon which Stouder had in the past hired scrub nurses into its own employment", which evidenced Stouder's discriminatory purpose. J. App. at 75. Therefore we find that the court's finding that the standards used to deny Christopher's application were employed for a retaliatory purpose was not clearly erroneous. [18]

V.

On cross-appeal, Christopher challenges the trial court's failure to grant her back pay damages on her retaliation claim. As Christopher points out, this court has held that:

> The finding of discrimination by the district court, in addition to the nature of the relief (compensatory as opposed to punitive), and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present.

Head v. Timken Roller Bearing Co., 486 F.2d 870, 876 (6th Cir. 1973). Moreover, this court has held that mere difficulty in calculating the amount of the pay award does not constitute "exceptional circumstances" such as would justify the denial of back pay. *Rasimas v. Mich. Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). However, an "[a]ward of back pay is not an automatic or mandatory remedy but is within the discretion of the [Trial] Court." *Kennerly v. ARO, Inc.*, 447 F.Supp. 1090, 1101 (E.D. Tenn. 1987) (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975)). Christopher argues that the trial court had no recognizable justification for denying back pay.

The trial court addressed the issue of back pay twice in its various post trial orders. In its original memorandum opinion, the court found that Christopher was not entitled to back pay for two alternative reasons. First, the court asserted that it was not entitled to granted compensatory damages under Title VII and that since Stouder was not Christopher's employer and would not have paid her salary, it could not be charged with back pay damages. Second, the court noted that "the proof of loss with respect to that potential employer was quite sketchy." J. App. at 33.

Subsequently, the court amended its prior findings of [19] fact and conclusions of law on the back pay issue. In its amended

findings, it first noted that it was in error as to its inability to grant a back pay award against Stouder. However, the court explained and affirmed its findings as to the inconclusive nature of the proof on back pay. The court stated:

> [T]he testimony was very vague about what the arrangement [between Christopher and her husband and his partner] was going to be. The Court's notes reflect no testimony from Ms. Christopher about a pay arrangement. Dr. Dysert testified that [the partnership was] still trying to save for a laser [for surgery] and probably would have started Ms. Christopher out at $1.00. Dr. Christopher admitted there was no agreement about what to do, but thought her salary probably would be $12,000 per year when she sent on the doctor's payroll.
>
> • • •
>
> The extreme ambiguity of the intended arrangement as outlined above shows Plaintiff did not prove what she actually would have received. Nor was there any proof of what other private duty nurses are paid so as to permit finding an average. Plaintiff did not even suggest in her Proposed Findings of Fact and Conclusions of Law an amount of lost wages from the intended arrangement. While back pay in a Title VII case need not be proven with the exactitude of lost profits in a breach of contract case, neither can such an award be appropriately founded on mere speculation.

J. App. at 37-38. Based upon these findings, we find that the court did not abuse its discretion in denying back pay in this case. Therefore, we affirm the denial of back pay.

VI.

For the foregoing reasons, we **REMAND** for the trial [20] court to make specific findings as to Christopher's qualifications to perform as a private scrub nurse at the time she was denied privileges. We **AFFIRM** the findings of the trial court in all other respects. [21]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANASTASIA S. CHRISTOPHER,

Plaintiff, : Civil Action No. C-3-87-249

- vs - Magistrate Merz

STOUDER MEMORIAL HOSPITAL,

Defendants. :

ORDER DENYING MOTION FOR NEW TRIAL AND SETTING PROCEDURES CONCERNING SUPERSEDEAS BOND

This case is before the Court on Defendant's Motion for a New Trial. (Doc. 55).

This action was tried to the United States Magistrate in July, 1988, sitting without a jury and with the consent of the parties pursuant to 28 U.S.C. §636(c). On July 5, 1988, the Court entered its Memorandum Opinion and Decision embodying findings of fact and conslusions of law under Fed. R. Civ. P. 52. (Doc. 22). The Court found, *inter alia*, that Plaintiff had been denied limited staff privileges as a private duty scrub nurse at Defendant's facility in retaliation for her prior protected activity under Title VII and also found that she was entitled to reinstatement of those limited privileges.

Defendant filed the present motion pursuant to Fed. R. Civ. P. 59 and moved the Court for a new trial on the basis that the Court lacks jurisidiction in this matter. Specifically, Defendant argues that the position to which Plaintiff aspired - - that of a private duty scrub nurse - - is clearly that of an independent contractor and therefore the protections of Title VII are not available.

In her Memorandum in Opposition, Plaintiff argues that

Defendant had consistently maintained that Plaintiff was in fact, Defendant's employee (a "pool nurse") throughout the relevant time period. Plaintiff also argues that a formal employer - employee relationship is not needed for Title VII protections to be available but rather, a Plaintiff is protected against discrimination if the Defendant is one who significantly affects access of any individual to employment opportunities. Finally, Plaintiff argues that even if she was not an employee at the time of the retaliatory acts she was at least a former employee and Title VII protections are available when a claim of retaliation is brought by a former employee.

In reply, Defendant cites to numerous cases where courts have held that Title VII protections were not available because no employee status was established. Defendant essentially repeats its argument that Plaintiff was an independent contractor and therefore Title VII protections are not available to her.

Title VII makes it an unlawful employment practice for an employer to discriminate against any of its employees or applicants for employment because she has opposed any practice made unlawful by Title VII, or because she has made a Title VII charge. *See*, 42 U.S.C. §2000e-3.

Title VII defines "employee" in broad language: "the term 'employee' means an individual employed by an employer . . ." 42 U.S.C. §2000e(f). The legislative history supports the view that Congress intended to cover the full range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception. *Armbruster v. Quinn,* 711 F.2d 1332, 1339 (6th Cir. 1983). The term 'employee' in Title VII "must be read in light of the mischief to be corrected and the end to be attained." *Id.* at 1340 (citation omitted). The mischief to be corrected is that discrimination in employment opportunity has been made unlawful by Title VII's violation provisions; the end, to rid from the world of work of the evil of discrimination because of an individual's race, color, religion, sex or national origin. *Id.* Since the statute has been

universally held to be broadly remedial in its purpose, such remedial effect can be given only upon a broad interpretaton of the term 'employee'. *Id.* at 1341. One must examine the economic realities underlying the relationship between the parties in an effort to determine whether an individual is likely to be susceptible to the discriminatory practices which the Act was designed to eliminate. *Id.* at 1340. In view of the broad terms of Title VII, reasonably precise exceptions, and legislative history all directed towards a test of coverage to all those who are in a position to suffer the harm the statute is designed to prevent, unless specifically excluded, where there is a doubt or ambiguity, it should be resolved in favor of coverage. *Id.* at 1341.

Although the Sixth Circuit has rejected a narrow construction of the term 'employee' under Title VII, is has nevertheless adhered to a standard that would exclude from the protection of Title VII a person who cannot be considered an employee but is instead clearly an independent contractor. *Falls v. The Sporting News,* 834 F.2d 611 (6th Cir. 1987) (citations omitted).

There is no question that if Plaintiff was Defendant's employee at the time of the discriminatory acts then Title VII protections are available to Plaintiff. However, for the reasons stated more fully below, this Court does not need to make a determination of whether Plaintiff was Defendant's employee at the time of the unlawful acts.

This Court finds that as a private scrub nurse, Plaintiff would not be an independent contractor with respect to Defendant. In the capacity of private scrub nurse, Plaintiff would perform no services for Defendant nor would she be paid by defendant for any services. Plaintiff would perform services for the physicians by whom she would be employed. Accordingly, the *Falls*, 'independent contractor exception' is not applicable in this case.

The facts of this case are strikingly similar to those in *Sibley Memorial Hospital v. Wilson*, 488 F.2d 1338 (D.C. Cir. 1973). In *Sibley*, the plaintiff was a male private duty nurse who worked in a

private hospital and who obtained employment with patients by referral through a nurses' registry. When a patient needed a private duty nurse, the hospital's nursing office would communicate the request to the registry. Neither the hospital nor the registry was permitted to discriminate on the basis of sex. The registry would match the patient with an available nurse, and the nurse would report to the patient. If the nurse was unacceptable to the patient for any reason, the patient would still be required to pay the nurse one day's wages. The plaintiff complained that supervisory nurses at the defendant hospital has themselves rejected him and prevented him from reporting to the patient when the patient was a female.

The court in *Sibley* held that the plaintiff had a Title VII claim, despite the absence of an employment relationship between the nurse and the hopsital. The court first noted that in Title VII Congress had intended to "achieve *equality of employment opportunities.*" *Sibley*, 488 F.2d at 1340-41 (emphasis in original) (citations omitted).

> Control over access to the job market may reside, depending upon the circumstances of the case, in a labor organization, an employment agency, or an employer as defined in Title VII; and it would appear that Congress had determined to prohibit each of these from asserting any power it may have to foreclose, on invidious grounds, access by any individual to employment opportunities otherwise available to him. To permit a covered employer to exploit circumstances peculiarly affording it the capability of discriminatorily interfering with an individual's employment opportunities with another employer, while it could not do so with respect to employment in its own service, would be to condone the continued use of the very criteria for employment that Congress has prohibited.

Id. at 1341.

In *Sibley*, the private nurse was not the hospital's employee nor was he an independent contractor with respect to the hospital.

Although the hospital provided equipment, supplies, a place for him to perform his work and presumably imposed standards, his employment relationship was with the patients and not with the hospital. However, the hospital was in the position to interfere with his employment relationships and opportunities and the court found that was sufficient for Title VII protections to attach.

In the present case, as a private scrub nurse, Plaintiff would not be a hospital employee nor would she be an independent contractor with respect to the hospital. As in *Sibley*, although Defendant would provide Plaintiff with equipment, supplies, instruments, a place for her to perform her work, and impose standards, Plaintiff's employment relationship would be with the physicians for whom she works. However, and again as in *Sibley*, Defendant was in a position to interfere with Plaintiff's employment relationship and opportunities. By discriminating against Plaintiff and refusing to grant privileges to work in its facility, Defendent realistically prevents Plaintiff from performing the job for which she was hired by the physicians. This clearly interferes with Plaintiff's employment relationship with the hiring physicians and with her opportunity to perform her work. Therefore, Title VII projections are available to Plaintiff and this Court has jurisdiction of her Title VII claims.

For all of the foregoing reasons, this Court finds that Title VII protections are available to Plaintiff and therefore this Court has jurisdiction over Plaintiff's Title VII claims. Accordingly, Defendant's Motion for a New Trial is not well taken and is overruled.

It is therefore ORDERED that Defendant's Motion for a New Trial is overruled.

This case is also before the Court upon Defendant's Motion to Stay Execution of Judgment pending decision on the motion for a new trial (Doc. #56) and Defendant's Memorandum Requesting Clarification (Doc. #61).

At the time the motion stay execution was filed, the Court held a conference among counsel on February 20, 1990, who agreed that they would confer and agree on an amount liquidated damages which would be suffered by Plaintiff for each day or other work period she missed pending decision on the motion for new trial and presumably pending appeal. On March 27, 1990, Plaintiff's counsel reported to the Courts clerk that the parties had been unable to agree on an amount of liquidated damages, but continued to agree in principle on that approach.

Defendant has now filed a Memorandum Requesting Clarification (Doc. #61) which in its penultimate paragraph asks this Court to amend the judgment and enter judgment for Defendant on the grounds that Plaintiff is not qualified as a private duty scrub nurse.

The memorandum, which is in reality a motion to amend the judgment, is untimely. Under Fed. R. Civ. P. 59(e), such a motion must be filed not later than ten days after the entry of judgment, which occured February 5, 1990.

Moreover, the reasoning of the Memorandum is flawed. It repeats the observation that Ms. Christopher does not meet Stouder's present standards for private duty scrub nurse nursing, but the Court previously found that those standards were developed as part of Stouder's discrimination against Stacy Christopher: they were written in a way which made her ineligible, but differed substantially from the bases upon which Stouder had in the past hired scrub nurses into its own employment.

Defendant argues that Ms. Christopher does not meet the standards of other area hospitals, and that is apparently true. However, those hospitals did not develop their standards as part of a discriminatory pattern and they are not defendants in this action.

Defendant also argues that Ms. Christopher has not been in an operating room for over four years. However, it is Stouder Hospital which has adamantly fought Ms. Christopher's return to the

operating room since this litigation was filed.

When the Court made its initial decision on liability, it attempted to accommodate Stouder's concerns about Ms. Christopher's technical competence by getting that competence certified by disinterested outside experts. That process turned out not to be feasible. During that entire process, Stouder has refused to compromise at all.

The Court reiterates its prior Order: Defendant shall grant the Plaintiff limited private duty scrub nurse privileges in accordance with her application of March 26, 1986. Without modifying that judgment, the questions presented by Defendant for interpretation are answered as follows:

1. Stouder may require Plaintiff to fill out an updated application to the extent that such application is for information gathering. The application to be granted is that of March 26, 1986.
2. Stouder may verify Mr. Christopher's licensure.
3. Stouder may not request up-to-date references.
4. Stouder may inquire about continuing education, but may not refuse privileges on the basis of any answer. Once privileges are granted, Ms. Christopher may be required to fulfill any continuing education requirement imposed by Stouder on private duty scrub nurses equally.
5. Stouder may require proof of insurance to the same extent it does with other private duty scrub nurses.
6. Ms. Christopher is not required to meet current criteria.

Although the Court urges the parties to negotiate an end to this controversy, the Court assumes that Defendant intends to appeal. If a notice of appeal is filed, the Court wishes to indicate its willingness to stay execution pending appeal upon the posting of a supersedeas bond in an amount double the reasonably expected annual income of Ms. Christopher is she were permitted to work. Since the Court understands the parties have been unable to reach an agreement on what that amount would be, on request of either

party the amount supersedeas bond will be set for prompt hearing.

UNITED STATES MAGISTRATE

Filed March 30, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

ANASTASIA S. CHRISTOPHER,

Plaintiff, : Civil Action No. C-3-87-249

- vs - Magistrate Merz

STOUDER MEMORIAL HOSPITAL,

Defendant. :

JOURNAL ENTRY MODIFYING DECISION ON REMEDY

This action was tried to the United States Magistrate in July, 1988, sitting without a jury and with the consent of the parties under 28 U.S.C. §636(c). On July 25, 1988, the Court entered its Memorandum Opinion and Decision embodying findings of fact and conclusions of law under Fed. R. Civ. P. 52.

The Court determined that Plaintiff had been denied limited staff privileges as a private duty scrub nurse at Defendant's facility in retaliation for her prior protected activity under Title VII and found that she was entitled to reinstatement of her limited privileges. It directed the parties to negotiate a neutral objective measurement of her technical competence as a scrub nurse (Doc. #22).

The parties were unable to agree and the Court held a hearing remedy on October 31, 1988. On March 6, 1989, the Court adopted Plaintiff's proposal that she work under the supervision of a neutral obstetrician/gynecologist for six weeks and obtain his or her report on her competence (Doc. #47).

Plaintiff now reports to the (Doc. #50) that despite diligent effort she has been unable to carry out this plan. From her report, she is in a "Catch 22" situation: she cannot obtain limited privileges

at Good Samaritan Hospital so as to work with the doctors the Court has approved, probably because of her prior legal difficulties, although this has not yet been proven.

What has been proven to the Court's satisfaction is that its earlier decision on remedy is flawed. The Court has determined that Plaintiff was unlawfully deprived of limited privileges at Stouder and is entitled to their restoration (Doc. #22). Plaintiff's good faith efforts and Defendant's prior inability to suggest a workable alternative convince the Court that it must now order restoration of the privileges without further processing of the Plaintiff.

It is accordingly ordered that Defendant grant Plaintiff limited staff privileges as a private duty scrub nurse in accordance with her application of March 25, 1986. Such privileges shall permit her to work as a private duty scrub nurse only for those doctors who desire her services in that capacity and who themselves compensate her directly for her services and maintain adequate malpractice insurance covering her work. In other words, it is not the Court's intention to compel Stouder to enter into an employment relationship with Ms. Christopher. It is the Court's understanding from the hearing on remedy that this is exactly the way in which other private duty scrub nurses are treated at Stouder.

UNITED STATES MAGISTRATE

Filed February 5, 1990